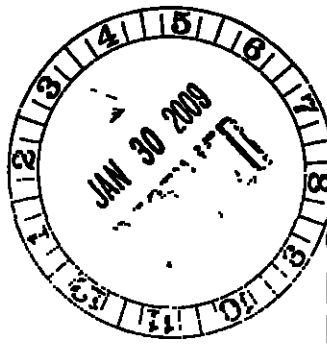


January 29, 2009

Surface Transportation Board
395 F Street, S W
Washington, DC 20024



224521



**GREAT
RIVERS**
Environmental Law Center
The legal resource for natural resources

Re Petition for Declaratory Order of State of Missouri,
ex rel Missouri Attorney General, Docket No AB-
102 (Sub-No 13), Missouri-Kansas-Texas
Railroad Company -- Abandonment --in St
Charles, Warren, Montgomery, Callaway Boone,
Howard, Cooper and Pettus Counties, Mo

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Founding President
Lewis C Green 1924 2003

Dear Sir or Madam

Great Rivers Environmental Law Center ("Great Rivers") submits the following comments concerning the Petition for Declaratory Order of State of Missouri, ex rel Missouri Attorney General, filed on or about January 12, 2009 in Docket No AB-102 (Sub-No 13). For the reasons set forth below, Great Rivers supports the State's request that the Surface Transportation Board ("the Board") entertain the State's Petition for Declaratory Order and institute a proceeding to terminate the controversy concerning the Boonville railroad lift bridge.

Great Rivers currently is serving as a consulting party in a process under the National Historic Preservation Act ("NHPA") concerning the Bridge and now pending before the U S Coast Guard. Further, over the past three years, Great Rivers has represented multiple persons and organizations in an effort to preserve the portion of the Katy Trail corridor that consists of the historic Boonville Lift Bridge. Among these are:

Raye Reynolds (Ms Reynolds negotiated and signed, on the Railroad's behalf, the transfer of M-K-T's operating corridor to the Missouri Department of Natural Resources (MDNR)).

Frederick Brunner (Dr Brunner, as the then Director of MDNR signed the Interim Trail Use Agreement on MDNR's behalf).

G Tracy Mehan, III. (Mr Mehan, as the then Director of MDNR, presided at the opening of the Katy Trail).

Steve Mahfood (Mr Mahfood, as the then Director of MDNR, opposed Union Pacific's efforts to remove the Boonville Lift Bridge), and

Pat Jones Mrs Jones, together with her husband Edward (Ted) Jones, donated the \$200,000 sum that funded the creation of the Katy Trail. After the initial donation, the Joneses donated an additional \$2,000,000 to improve the Katy Trail. Mrs Jones' understanding is that her \$200,000 initial contribution was

*Surface Transportation Board
January 29, 2009*

used to fund a continuous, rail-banked corridor, including the historic Bridge

These persons, together with Great Rivers, have been working to preserve the historic Bridge as a vital part of the Katy Trail corridor

In support of the State of Missouri's request that the Board institute a proceeding to terminate the controversy between the State and UP, Great Rivers joins in the reasons set forth in the States' Petition for Declaratory Order. Further, Great Rivers puts forth the following additional reasons:

Union Pacific's attempted notice of consummation was a nullity because there is an existing historic preservation condition to the abandonment authorization that has not been discharged.

The Board must discharge the historic preservation condition before Union Pacific can “consummate” the abandonment by removing the bridge.

The Board has an obligation to comply with Section 106 of the NHPA before discharging the historic preservation condition, and that obligation cannot be delegated to Union Pacific.

The Board did not participate in the Coast Guard's Section 106 process.

The Coast Guard's Section 106 process is unlawful for reasons including those set out below, and therefore, the Board must itself comply with Section 106 before directing historic preservation condition, and

The Board should investigate what can be done to
by beginning to remove the Bridge, in violation of the
Preservation Act and the Board's historic

The Coast Guard

One of the express goals of the NHP is to minimize or mitigate any adverse effects on the Council on Historic Preservation, 36 C.F.R. 1.10. It makes clear, the responsible federal agency does not issue a license or grant for historic property when it issues a license or grant process. See 36 C.F.R. § 800.1(c) ("The agency shall not approve the expenditure of any funds prior to the approval of the expenditure of any funds for the issuance of any license"). See also the Secretary of the Interior's Standards for Federal Agency Historic Preservation Programs, which includes assessment of the widest range of preservation planning. Further, according to these Standards,

1-30-09

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Surface Transportation Board
January 29, 2009

Full consideration of historic properties includes procedures to identify, discourage, and guard against "anticipatory demolition" of a historic property by applicants for Federal assistance or license. Agency procedures should include a system for **early warning** to applicants and potential applicants that anticipatory demolition of a historic property may result in the loss of Federal assistance, license or permit, or approval for a proposed undertaking.

Instead of warning Union Pacific about an illegal "anticipatory demolition," the Coast Guard persuaded Union Pacific to resubmit a pending bridge application scrubbed of any reference of using spans from the historic bridge.

The Coast Guard's Flawed NEPA Analysis

The Coast Guard's National Environmental Policy Act (NEPA) analysis concerning the Bridge is fatally flawed as well because demolition of the Boonville Lift Bridge and the construction of a new bridge are cumulative actions, requiring the Coast Guard to have evaluated their impacts together.

The National Environmental Policy Act (NEPA) requires agencies to evaluate together actions which are sufficiently related. The CEQ regulations refer to these related actions as "cumulative" actions. 40 C.F.R. § 1508.25(a)(2). See, e.g., *Arkansas Wildlife Federation v. U.S. Army Corps of Engineers*, 431 F.3d 1096, 1101 (8th Cir. 2005) (§ 1508.25 of the CEQ regulations requires the agency to study the direct, indirect, and cumulative impacts of the proposed action). *Sierra Club v. Bosworth*, 352 F. Supp.2d 909, 925 (D. Minn. 2005) (agency must consider the proposed action and all connected actions and cumulative actions when determining the scope of its analysis under NEPA). The requirement prevents an agency from "segmenting" actions which are sufficiently related so as to require consideration in a single E.A. or EIS that evaluates the combined effects of the actions. *Thomas v. Peterson*, 753 F.2d 754, 757-58 (9th Cir. 1985). Not requiring this would permit an agency to divide a project into multiple actions, each of which individually has an insignificant environmental impact, but which collectively have a substantial impact. *Thomas v. Peterson*, 753 F.2d at 758. The courts have consistently applied the cumulative and connected actions requirements to Environmental Assessments as well as Environmental Impact Statements. E.g., *One Thousand Friends of Iowa v. Mineta*, 364 F.3d 890, 894 (8th Cir. 2004); *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985).

In 2004, Union Pacific's consultant acknowledged that Union Pacific's proposed bridge over the Osage River and the Boonville Lift bridge are sufficiently related to require consideration together. The draft Environmental Assessment that it submitted to the Coast Guard conceded that

Surface Transportation Board
January 29, 2009

The proposed project involves work at two sites. In this and all subsequent sections the new bridge over the Osage River will be discussed first. Then, the Boonville Bridge the bridge that will be removed, will be discussed.

Instead of evaluating the combined impacts, the Coast Guard persuaded Union Pacific to resubmit a pending bridge application scrubbed of any reference of using spans from the historic bridge. The Coast Guard then prepared an Environmental Assessment omitting any reference to the historic bridge. Regardless of the actions taken by the Coast Guard to remove references to the historic bridge, the use of spans from the historic bridge to construct a new bridge is reasonably foreseeable. The demolition of one and the construction of the other are sufficiently related. The Coast Guard unlawfully segmented the two.

Conclusion

For all of the foregoing reasons, Great Rivers joins in the State of Missouri's request that the Board entertain the State's Petition for Declaratory Order and institute a proceeding to terminate the controversy between the State and UP and remove the uncertainty of the status of the Boonville railroad lift bridge.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce A. Morrison", with a long horizontal flourish extending to the right.

Bruce A. Morrison